NO. 90-1015

IN THE
SUPREME COURT OF THE UNITED STATES

J. O. DAVIS,

Petitioner,

vs.

REGINALD JONES, in forma pauperis,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE ELEVENTH CIRCUIT COURT OF APPEALS

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ARGUMENT

The State of Alabama has filed a Petition for Writ of Certiorari asking this Court to review three questions presented in the reversal by the Eleventh Circuit Court of Appeals of a determination of the District Court on Jones's habeas corpus petition. For the purposes of this initial response only, Jones accepts the identification of the questions presented as set forth in the petition. Each question presented will be discussed in the order presented by the petition.

> 1. Do the requirements and guidelines of Swain v. Alabama, 380 U.S. 202 (1965), allow a habeas corpus petitioner to establish a prima facie violation of the guidelines of that case through the presentation of conclusory, anecdotal testimony that, in the opinion of the witnesses, the prosecution has in the past used its peremptory challenges in a racially discriminatory manner?

The State of Alabama contends that the Eleventh Circuit in its two opinions in this case impermissibly modified Swain v. Alabama when it originally found that Jones had made out a prima facie case of racial discrimination in the jury selection process and, later, when it confirmed its original findings and remanded the case with instructions to grant the writ.

It should be noted at the outset that the State of Alabama made the identical argument in its original Petition for Writ of Certiorari following the decision of the Eleventh Circuit Court of Appeals in Jones I. This Court has previously denied certiorari as to the first question presented by the State of Alabama. This Court having considered the matter previously, Jones would submit that this prior determination alone is reason

enough to deny the petition. The State should not be accorded an opportunity to present this question to this Court twice in the same case. Nevertheless, Respondent will address the material allegations of the petition.

Willis v. Zant, 720 F.2d 1212 (11th Cir. 1984) has been the law of this circuit since 1984 and is well settled. It modified the rigid, outmoded Swain standard by quite logically holding that a habeas petitioner need not prove that a prosecutor always struck every black venireman in order to establish a prima facie case of racially discriminatory exercise of peremptory challenges. It likewise established a means by which a District Court can determine the existence of a Swain violation.

It adopted an analysis used in employment discrimination cases which places upon the petitioner the burden of establishing a prima facie case and then, once established, shifts that burden to the State to present competent, relevant rebuttal evidence of the non-existence of a systematic and historic pattern of exclusion of blacks from traverse juries in the particular jurisdiction.

In Jones I, the Eleventh Circuit Court of Appeals held that Jones had made out a prima facie case of racial discrimination and remanded the case to the District Court for the purpose of taking additional testimony from both sides. The District Court had not at that time conducted an evidentiary hearing and the sole record upon which the initial order denying the writ of habeas corpus was made derived from proceedings in the trial

court, the Circuit Court of Mobile County, Alabama.

The Eleventh Circuit reviewed those proceedings and determined that although Jones made out a prima facie case, he was restricted in his presentation of additional evidence and the prosecutor apparently believed that he need not adduce rebuttal evidence. 835 F.2d at 840. For this reason, the Eleventh Circuit remanded the case to the District Court for an evidentiary hearing to be conducted in accordance with Willis v. Zant, to accord both parties an opportunity to present additional evidence. Id.

The District Court on remand understood the Eleventh Circuit to have ordered what it termed a "full evidentiary hearing" and for this reason determined that the Eleventh Circuit must not have meant what it said when it found that Jones had made out a prima facie case of discrimination. (Appendix at p. 29a). This question had been previously resolved in Jones I and by this Court when it denied the State's Petition for Writ of Certiorari following Jones I. This question should not be heard again.

> 2. Does the opinion of the Fifth Circuit Court of Appeals in Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), cert. denied, 109 S.Ct. 1328 (1989) state the proper standard for evaluation of statistical evidence in a Swain case?

The State contends that there exists a conflict between the Fifth Circuit and the Eleventh Circuit in connection with evaluation of a Swain case. In actuality, no conflict exists. The State relies solely upon the case of Edwards v. Scroggy, 849 F.2d 204 (5th Cir. 1988), a decision of the Fifth Circuit in

which no witness testified as to any fact, other than expert statisticians who examined a significant number of cases and established a statistical disparity which the Fifth Circuit found not per se violative of the habeas petitioner's rights.

In this case, the Eleventh Circuit held that Jones made out a prima facie case, and did not even address the statistical evidence introduced at the evidentiary hearing. The District Court found that the statistical evidence was not based upon a sample sufficient to possess any validity. (Appendix at p. 39a, n. 13, 40a-41a, 65a) The Edwards court made the opposite finding: the statistical base was sufficient to possess arguable validity. Since the statistical disparity was the issue in Edwards, and since no such stastistical disparity is involved in the case sub judice, no conflict between the circuits exists requiring resolution by this Court. Edwards was a statistical case. This case is not.

If accepted by this Court, the State's argument would lead to the legal conclusion that statistical evidence is the only means by which a Swain violation could be proved. Such a holding would implicitly and overrule Swain retroactively and Willis.

3. Does the law of the case doctrine apply when a fair reading of the original opinion does not support the application given in a subsequent opinion and when the original opinion is ambiguous.

The State of Alabama contends that the opinion of the Eleventh Circuit in Jones I is ambiguous and that its opinion in Jones II is not supported by a fair reading of Jones I. Respondent contends that the only ambiguity inherent in Jones I

is the tortured construction of that decision contained in the opinion of the District Court on remand. The Eleventh Circuit could have been no more clear in its original pronouncement than when it described a petitioner's burden of proof and wrote, "We believe Jones has met this initial burden." 835 F.2d at 838.

On remand following the Jones I decision, Jones filed a motion for partial summary judgment on the ground that the decision of the Eleventh Circuit constituted the law of the case. (Appendix at p. 28a). The District Court did not rule on the motion, but informed the parties that it considered the opinion of the Eleventh Circuit in Jones I to be law of the case. Yet, inexplicably, the District Court found once again that Jones had not made out a prima facie case under Swain.

The prior Jones opinion governs this case. Both the District Court and the Eleventh Circuit are bound by the findings of fact and conclusions of law made by the Eleventh Circuit in Jones I. Barber v. International Bhd. of Boilermakers, 841 F.2d 1067, 1070-71, 1072 (11th Cir. 1988); Litman v. Massachusetts Mut. Life Ins. Co., 825 F.2d 1506, 1510-1512 (11th Cir. 1987), cert. denied, 484 U.S. 1006, 108 S.Ct. 700, 98 L.Ed.2d 652 (1988); United States v. Robinson, 690 F.2d 869, 872 (11th Cir. 1982). A District Court may not circumvent an appellate mandate by viewing the case in a differently colored light or by "approaching the identical legal issue under an entirely new theory". Barber, supra, 841 F.2d at 1070-1071.

Under United States v. Robinson, the District Court may

reconsider an issue decided by an appellate court only when "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to that issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." 690 F.2d at 872. Jones contends that none of these circumstances obtains in his case.

The prior decision of the Eleventh Circuit in Jones I was the law of the case. The same, if additional, evidence was adduced on remand. The law didn't change in the interrim. The Eleventh Circuit reaffirmed its determination in Jones I, concluding that its prior determination was not clearly erronoeous.

CONCLUSION

This case has received enough attention. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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